IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SON VAN NGUYEN,
Appellant.

No. 2 CA-CR 2015-0177
Filed July 19, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20141256001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, Son Van Nguyen was convicted of domestic violence assault. On appeal, he argues the assault charge for which he was convicted was duplicitous, the trial court erred by allowing the state to reopen its case, and the court erred in denying his motion for a judgment of acquittal. For the reasons discussed below, we affirm Nguyen's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Gunches*, 225 Ariz. 22, n.1, 234 P.3d 590, 591 n.1 (2010). In 2008, Nguyen and L.G. started dating in Massachusetts. The couple eventually moved to Tucson, Arizona, and purchased a home together in 2013. In January 2014, however, they ended their relationship. In February 2014, L.G. obtained an order of protection against Nguyen.

¶3 In March 2014, L.G. invited A.P., a federal law enforcement officer, to her home for lunch. When A.P. arrived he had a gun holstered on his belt. A neighbor, not knowing A.P., contacted Nguyen and told him he saw a man with a gun go into the house. Nguyen went there and entered, finding L.G. and A.P. in the bedroom. He attacked A.P., striking him multiple times in the face. He and L.G. then went to the living room where Nguyen grabbed L.G. and threw her on a couch. He allegedly got on top of her, ripped off her shirt and bra and tried to pull down her pants. Unable to do so, Nguyen allegedly put his hands in her pants and underwear, attempting to digitally penetrate her, saying, "[Y]ou're a whore, is that what you want, is that what you want[?]" Nguyen slapped L.G. when she told him to stop.

¶4 A.P. eventually came out to the living room, gun drawn, and, identifying himself as a federal agent, ordered Nguyen to get off L.G. A.P. then pushed Nguyen off L.G., and Nguyen left the house. He surrendered to police the next day.

¶5 A.P. suffered a broken nose and lacerations to his lip. A sexual assault nurse examiner documented a total of eighteen injuries to L.G.'s body.

¶6 The state charged Nguyen with aggravated assault in violation of an order of protection, sexual assault, stalking, two counts of aggravated assault causing temporary but substantial disfigurement, aggravated assault of a peace officer, and burglary in the second degree. At trial, the state moved to amend the charge of sexual assault to attempted sexual assault, to which Nguyen had no objection. After the close of the state's case, Nguyen moved for a judgment of acquittal on all charges pursuant to Rule 20, Ariz. R. Crim. P. The state agreed to dismiss the charge of aggravated assault of a peace officer. The court denied the remainder of the motion, finding substantial evidence supported the remaining counts.

¶7 The jury acquitted Nguyen of aggravated assault in violation of an order of protection, but convicted him on the lesser-included offense of assault. The jury also acquitted Nguyen of stalking and attempted sexual assault. It was unable to reach a verdict on the remaining counts. The state later moved to dismiss those remaining counts without prejudice, which motion the court granted. The court subsequently sentenced Nguyen to a twelve-month period of supervised probation. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Duplicity

¶8 Nguyen argues his conviction was duplicitous because the state did not elect which type of assault it was prosecuting and the court did not require the jury to specify which element of the

assault charge it unanimously found beyond a reasonable doubt. Nguyen concedes he did not object to the indictment, verdict form, or jury instructions below, and thus may only seek relief based on fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 6-8, 222 P.3d 900, 903-04 (App. 2009); *but see State v. Butler*, 230 Ariz. 465, ¶ 15, 286 P.3d 1074, 1079-80 (App. 2012) (expressing doubt as to whether duplicitous indictment may be raised on appeal in absence of objection below). Error is fundamental if it "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. A violation of the right to a unanimous jury verdict constitutes fundamental, prejudicial error. *Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d at 907-08.

¶9 Arizona law requires "each separate offense must be charged in a separate count." *Spencer v. Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983); *see* Ariz. R. Crim. P. 13.3(a). "A 'duplicitous charge' is one that alleges multiple crimes due to the presentation of evidence at trial, whereas a 'duplicitous indictment' is one that, on its face, alleges multiple crimes within one count." *Butler*, 230 Ariz. 465, ¶ 13, 286 P.3d at 1079; *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008) (duplicitous charge arises when charge in indictment refers only to one criminal act, but multiple criminal acts are introduced to prove it). Dismissal of a duplicitous indictment is not required, however, unless the defendant actually suffered prejudice as a result of the duplicity. *State v. Schroeder*, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App. 1990).

¶10 A duplicitous charge can "deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy[] in the event of a later prosecution.'" *Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847, *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003) (alteration in *Klokic*). If the state elects to introduce evidence of multiple criminal acts to prove a single charge, the trial court must take one of two remedial measures to ensure a unanimous jury verdict: it must either require the state to

specify which act constitutes the crime or it must instruct the jury to unanimously agree on a specific act constituting the crime charged. *Id.* ¶ 14. But this rule does not apply "'where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense.'" *State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App. 1996), *quoting State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968). Multiple acts are not "considered part of the same criminal transaction if the defendant offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them." *Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d at 851.

¶11 A person commits aggravated assault "[i]f the person commits assault . . . and the person is in violation of an order of protection issued against the person." A.R.S. § 13-1204(A)(7).

> A person commits assault by:
>
> 1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
>
> 2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
>
> 3. Knowingly touching another person with the intent to injure, insult or provoke such person.

A.R.S. § 13-1203(A). Under Arizona law, "the three subsections of § 13-1203(A) 'are not simply variants of a single, united offense; they are different crimes.'" *State v. Delgado*, 232 Ariz. 182, ¶ 22, 303 P.3d 76, 83 (App. 2013), *quoting In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006).

¶12 Nguyen argues there was a substantial risk his conviction was based on a non-unanimous verdict because the state did not identify in the indictment or at trial the alleged act that formed the basis for the underlying assault charge. According to Nguyen, the state presented evidence at trial sufficient to convince a

reasonable jury to find him guilty of three separate types of assault: physical injury, reasonable apprehension of physical injury, and touching with intent to injure, insult or provoke. Nguyen further argues the jury instructions and form of verdict failed to instruct or inform the jurors concerning which form of assault they were to consider.

¶13 But "[a]ppellate courts do not evaluate jury instructions out of context." *See State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989). "Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *Id.* Here, in its closing argument, the state specifically identified the type of assault it was attempting to prove, stating:

> Let's go over the elements then. . . .
>
> . . . [S]o the first count—and you have the indictment—aggravated assault in violation of the protective order. What normally would be a misdemeanor assault if I slap you, I hit you, that's not aggravated assault except under this circumstance when you find that there is already an order of protection. There is an extra element. . . . As you saw in Count 1, there is a lesser. If you can't agree on the greater offense, you can consider just assault. . . . And the question is did he assault [L.G.]. This is only good for [L.G.], and there is no justification defense, by the way, for that. . . .
>
> So what is the physical injury intentionally caused? He slapped her. He caused whatever bruising that the nurse noted. Grabbed and pulled down her panties causing whatever on the groin. . . .
>
> Next one, threw her onto the couch, caused those various injuries on her wrist,

> on her knee, and other injuries that the nurse noted. What were they? Fourteen of them, abrasions.

Thus, any question that might have arisen from the wording of the jury instructions or form of verdict concerning the type of assault the state contended Nguyen had committed was cured by the state's closing argument.[1]

¶14 Nor did the court err by not requiring the state to specify which act introduced into evidence constituted the crime it sought to prove or by not instructing the jury to unanimously agree on a specific act constituting the alleged crime. *See Klokic*, 219 Ariz. 241, ¶¶ 14-15, 196 P.3d at 847. At trial, the state introduced evidence L.G. had suffered a total of eighteen injuries when Nguyen grabbed her, threw her on a couch, and slapped her.[2] But when "all the separate acts the State intends to introduce into evidence are part of a single criminal transaction," the trial court does not err in "fail[ing] to require . . . curative measures." *Id.* ¶ 15. And, as noted above,

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[1]In closing argument, Nguyen only focused on the element of assault alleged by the indictment:

> I want to talk about each crime individually and let's see what the State has proved. Aggravated assault, protection order, domestic violence. Son intentionally, knowingly caused physical injury to [L.G.]. Did he go over there with the intent of causing anybody physical injury? That's for you to determine.

[2]While the state could have charged Nguyen for each injury L.G. received, it was under no obligation to do so. *See Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d at 847 (In drafting an indictment, the state has discretion "to charge as one count separate criminal acts that occurred during the course of a single criminal undertaking even if those acts might otherwise provide a basis for charging multiple criminal violations.").

whether separate acts may be considered as part of a single criminal transaction depends on whether the defendant "offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them." *Id*. ¶ 32. Nguyen only offered one defense to each particular act: they did not occur.

¶15 And we find no reason to distinguish between the multiple acts. In *Counterman*, the state elicited testimony that the defendant fired a shot at the victim, missing, and a scuffle ensued afterwards between the defendant and another person, during which the defendant fired a second shot that hit the victim. 8 Ariz. App. at 530-31, 448 P.2d at 100-01. We concluded the two shots were part of the same criminal transaction that did not require the state to elect which assault the defendant committed. *Id.* at 531-32, 448 P.2d at 101-02. Similarly, Nguyen's acts of grabbing L.G., throwing her on a couch, and slapping her constituted a single assault against L.G. Thus, the trial court was not required to implement any curative measures. *See Klokic*, 219 Ariz. 241, ¶ 32, 196 P.3d at 851; *Solano*, 187 Ariz. at 520, 930 P.2d at 1323.

Jurisdiction and Judgment of Acquittal

¶16 Nguyen next argues the trial court erred in permitting the state to "reopen" its case to establish jurisdiction. According to Nguyen, the state failed to establish the alleged criminal conduct occurred in Pima County.[3]

[3]Nguyen argues the state's failure to produce evidence the crime occurred in Pima County constituted a failure to establish jurisdiction, but that argument amounts to a challenge of venue rather than jurisdiction. *See State v. Willoughby*, 181 Ariz. 530, 537 n.7, 892 P.2d 1319, 1326 n.7 (1995) ("Venue is a question of whether the trial court exercises jurisdiction in the proper locality."). "Venue and sovereign jurisdiction . . . are governed by different policy considerations." *Id.* While sovereign jurisdiction "may not be waived or changed," venue can be. *Id.* Specifically, "[t]he failure to object to venue before trial waives the issue on appeal." *State v. Girdler*, 138 Ariz. 482, 490, 675 P.2d 1301, 1309 (1983).

¶17 "[T]he decision to let the state reopen its case is left to the sound discretion of the trial court and will be adhered to in the absence of an abuse of that discretion." *State v. Riggins*, 111 Ariz. 281, 283, 528 P.2d 625, 627 (1974). A court does not abuse its discretion by allowing the state to reopen "even after both sides have rested, as long as the state acts in good faith, and the result does not prejudice the defendant." *State v. Walton*, 159 Ariz. 571, 582, 769 P.2d 1017, 1028 (1989), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 603 (2002); *see also State v. Dickens*, 187 Ariz. 1, 12, 926 P.2d 468, 479 (1996) ("In general, a 'trial court is not justified in closing the case until all evidence, offered in good faith and necessary to the ends of justice, has been heard, particularly where the plaintiff seeks to reopen *before the defense has presented any evidence* and where no surprise or prejudice would result therefrom.'"), *quoting* 75 Am. Jur. Trial § 387 (emphasis in *Dickens*), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, ¶¶ 15, 20, 274 P.3d 509, 512-13 (2012). In order to prejudice a defendant, the trial court's decision must have deprived the defendant of "a substantial right." *State v. Cota*, 99 Ariz. 237, 241, 408 P.2d 27, 29 (1965). A defendant does not have a "vested right in any neglect or omission on the part of the prosecuting attorney." *Id.*

¶18 Here, after the state rested,[4] Nguyen moved for a judgment of acquittal, asserting the state had failed to establish jurisdiction. The court denied the motion and permitted the state to reopen for the sole purpose of establishing the alleged incidents occurred in Pima County. The state then recalled a detective, who testified the address at which the events occurred was in Pima County. Nguyen was not prejudiced by this testimony "as he had [a] full and fair opportunity to rebut the additional evidence" thereafter.[5] *See State v. Archer*, 124 Ariz. 291, 293, 603 P.3d 918, 920

[4]The state argues it had not yet rested at the time of Nguyen's motion for a judgment of acquittal. Because we find no error, we assume, without deciding, that it had.

[5] Nguyen did not cross examine the detective about the location of the events or make any other attempt to contest jurisdiction.

(App. 1979). Accordingly, the court did not err in permitting the state to reopen its case.

¶19 Nguyen also argues the court erred in denying his motion for a judgment of acquittal. As discussed above, Nguyen appears to challenge both venue and jurisdiction of the trial court. To the extent he argues the state failed to establish proper venue, Nguyen did not object to venue at any time before trial and, therefore, we find the claim waived. *See State v. Girdler*, 138 Ariz. 482, 490, 675 P.2d 1301, 1309 (1983) ("The failure to object to venue before trial waives the issue on appeal.").

¶20 In reviewing a claim of insufficient evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against the defendant. *Id.* at 488, 675 P.2d at 1307. We review the trial court's ruling on a motion for a judgment of acquittal for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). "If reasonable persons could differ as to whether the evidence establishes a fact in issue, then the evidence is substantial." *McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d at 937.

¶21 Jurisdiction to prosecute a defendant for an offense exists if any element of the offense occurs within the state. A.R.S. § 13-108(A). Arizona does not treat jurisdiction as an element of an offense, and, thus, when jurisdictional facts are undisputed, the trial court may decide the issue. *State v. Willoughby*, 181 Ariz. 530, 538, 892 P.2d 1319, 1327 (1995). "In the absence of evidence contradicting jurisdiction . . . only the issues pertaining to criminality must go to the jury." *Id.* at 538-39, 892 P.2d at 1327-28.

¶22 Nguyen claims the court erred in denying his motion because "[a]t the time the Motion was denied, insufficient evidence had been presented that the offense occurred in Pima County." Nguyen's argument fails for several reasons. First, a motion for a judgment of acquittal is subject to the court's discretion to allow either party to reopen its case. *See Cota*, 99 Ariz. at 240-41, 408 P.2d

at 29. The court denied Nguyen's motion, permitted the state to reopen its case, and the state elicited testimony establishing the events at issue took place in Pima County. The court acted within its discretion by permitting the state to reopen and admitting evidence related to jurisdiction, and it did not err in denying Nguyen's motion.

¶23 Additionally, even without the additional testimony, the state had provided more than sufficient evidence to establish jurisdiction. At trial, a map was admitted into evidence identifying the address of the incident and that map was labeled "Tucson, AZ." The state also introduced testimony from L.G. indicating the incident took place at a home situated on the street indicated by the map, and testimony from multiple witnesses identifying the location of the incident on the map. Thus, the court did not err in denying Nguyen's motion.

Disposition

¶24 For the foregoing reasons, we affirm Nguyen's conviction and sentence.